

**IOWA DEPARTMENT OF INSPECTIONS AND APPEALS  
ADMINISTRATIVE HEARINGS DIVISION, UI APPEALS BUREAU**

**MATU D GWEE**

Claimant

**APPEAL NO. 23A-UI-05321-JT-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**

Employer

**OC: 04/16/23**

**Claimant: Respondent (2)**

Iowa Code Section 96.5(2)(a) & (d) – Discharge for Misconduct

Iowa Code Section 96.3(7) - Overpayment

**STATEMENT OF THE CASE:**

On May 22, 2023, the employer filed a timely appeal from the May 12, 2023 (reference 01) decision that allowed benefits to the claimant, provided the claimant met all other eligibility requirements, and that held the employer's account could be charged for benefits, based on the deputy's conclusion that the claimant was discharged on April 6, 2023 for no disqualifying reason. After due notice was issued, a hearing was held on June 12, 2023. Matu Gwee (claimant) did not comply with the hearing notice instructions to call the designated toll-free number at the time of the hearing and did not participate. Elsie Poucel of Equifax represented the employer and presented additional testimony through Augustus Busumbru, Peggy Belton, and Jen Ketelsen. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits 1 through 10 into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview. The fact-finding materials were not available at the time of the hearing but became available shortly after the hearing ended.

**ISSUES:**

Whether the claimant was discharged for misconduct in connection with the employment.

Whether the claimant was overpaid benefits.

Whether the claimant must repay overpaid benefits.

Whether the employer's account may be charged.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds:

Matu Gwee (claimant) was employed by Care Initiatives as a full-time Certified Nursing Assistant (CNA) at Ravenwood Specialty Care in Waterloo from 2013 until April 6, 2023, when the employer discharged her from the employment for repeatedly sleeping on the job. The claimant was assigned to the overnight shift, 10:00 p.m. to 6:00 a.m. During the overnight shift,

the claimant was responsible for responding to resident/patient call lights and otherwise assisting residents/patients as needed. On March 27, 2023 and again on April 6, 2023, the claimant intentionally went to sleep in the workplace at a time when she was supposed to be available to assist residents/patients. In both instances, the claimant slid two chairs together to create a comfortable sleeping position. In both instances, Augustus Busumbru, Administrator discovered the claimant asleep when he made rounds between 12:30 a.m. and 1:00 a.m.

The employer has a written policy that prohibits "Sleeping (or appearing to be sleep) on the job when not authorized to do so. The employer categorizes "intentionally sleeping on the job when not authorized to do so" a Critical/Type A violation that subjects the employee to immediate termination. In instances wherein an employee slept, but did not do so intentionally, the employer deems the sleeping conduct a Major/Type B violation that subjects the employee to a Final Written Correction Action and 3-day suspension upon the first offense and termination of the employee upon the second offense. The employer reviewed the written policies with the claimant at the time of hire.

Though the circumstances of the March 27, 2023 indicated the claimant intentionally went to sleep, the employer decided to categorize that incident as a Type B violation and issued a written warning to the claimant. The employer issued the reprimand on April 3, 2023. When the employer discovered the claimant sleeping again under nearly identical circumstances 10 days after the March 27 violation and just three days after the reprimand, the employer acknowledged the claimant's intentional sleeping behavior as a Type A violation and discharged the claimant from the employment later that day.

The claimant's personnel records include an October 3, 2022 written reprimand pertaining to an alleged sleeping incident on October 2, 2022. The reprimand indicates the employer suspended the claimant for three days and reminded the claimant of the sleeping policy in connection with issuing the reprimand. The employer warned the claimant that another similar incident could lead to termination of the employment.

The claimant established an original claim for benefits that was effective April 16, 2023. Care Initiatives is a base period employer. Iowa Workforce Development set the weekly benefit amount at \$624.00. The claimant received \$2,493.00 in benefits for five weeks between April 16, 2023 and May 20, 2023.

On May 3, 2023, an Iowa Workforce Development Benefits Bureau deputy held a fact-finding interview that addressed the claimant's separation from the employment. The claimant participated in the fact-finding interview. The claimant provided intentionally misleading material information at the time of the fact-finding interview. The claimant falsely asserted that she did not know her employment was in jeopardy. The claimant falsely asserted she had not received any prior verbal warnings regarding alleged sleeping on the job. The claimant had received two warnings for sleeping on the job, with the most recent warning being issued just three days prior to the final sleeping incident and discharge.

The employer, through its agent, received notice of the fact-finding interview, but did not participate. At time of the fact-finding interview, the deputy attempted to reach the employer at the telephone number of record, which number is the employer's corporate office number. When the employer did not answer, the deputy left a voicemail message that included appeal rights and requested a return call within 30-minutes. The employer and its agent did not respond within the time requirement. On May 4, 2023, one day after the fact-finding interview, the employer's agent took steps toward submitting protest materials via SIDES. It is unclear whether IWD ever received the SIDES protest materials. Because the materials were submitted after the fact-finding interview, IWD did not have and did not consider the written employer protest materials. At the fact-finding interview, the claimant intentionally and falsely asserted

she had been unaware her job was in jeopardy and that she had received no warnings prior to the discharge.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5(2)(a) and (d) provides as follows:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The disqualification shall continue until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

...

d. For the purposes of this subsection, "misconduct" means a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Misconduct by an individual includes but is not limited to all of the following:

...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(13) Theft of an employer or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. For the purposes of this rule, "misconduct" is defined as a deliberate act or omission by an employee that constitutes a material breach of the duties and obligations arising out of the employee's contract of employment. Misconduct is limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such a degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Misconduct by an individual includes but is not limited to all of the following:

(...

(2) Knowing violation of a reasonable and uniformly enforced rule of an employer.

...

(13) Theft of an employer's or coworker's funds or property.

(14) Intentional misrepresentation of time worked or work carried out that results in the individual receiving unearned wages or unearned benefits.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See Iowa Admin. Code r.871 -24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also *Greene v. EAB*, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4).

Sleeping on the job may constitute misconduct that would disqualify a claim for unemployment insurance benefits. See *Hurtado v. IDJS*, 393 N.W.2d 309 (Iowa 1986). In *Hurtado*, the employer had discovered the employee sleeping on the job twice, with the instances occurring approximately one year apart.

The claimant was discharged on April 6, 2023 for misconduct in connection with the employment. The evidence indicates the claimant at least twice intentionally slept on the job. The two final sleeping incidents occurred within a 10-day period. The claimant's intentional slumber violated the employer's known and uniformly enforced prohibition against sleeping on the job. The claimant's intentional slumber demonstrated a willful and wanton disregard of the employer's interests of the employer and exposed the employer to potential liability based on the claimant's neglect of her duties. The claimant's acts of sleeping at a time when she was supposed to be performing her work duties amounted to false timekeeping and wage theft. The claimant's intentional slumber demonstrated a disregard the safety and comfort of the residents/patients left in the claimant's care. The claimant is disqualified for benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements.

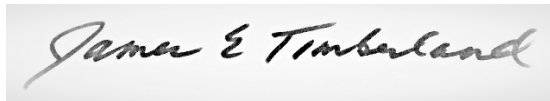
The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in

the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code § 96.3(7)(a) and (b).

The claimant received \$2,493.00 in benefits for five weeks between April 16, 2023 and May 20, 2023, but this decision disqualifies the claimant for the benefits she received. The claimant was overpaid \$2,493.00 in benefits for five weeks between April 16, 2023 and May 20, 2023. The employer had notice of the factfinding interview, but failed to participate. However, the claimant intentionally misrepresented material facts in her statement to the IWD deputy. Because of the claimant's willful misrepresentation of material facts, the claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.

**DECISION:**

The May 12, 2023 (reference 01) decision is REVERSED. The claimant was discharged on April 6, 2023 for misconduct in connection with the employment. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to 10 times her weekly benefit amount. The claimant must meet all other eligibility requirements. The claimant is overpaid \$2,493.00 in benefits for five weeks between April 16, 2023 and May 20, 2023. The claimant is required to repay the overpaid benefits. The employer's account will be relieved of liability for benefits, including liability for benefits already paid.



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James E. Timberland  
Administrative Law Judge

June 15, 2023  
Decision Dated and Mailed

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**APPEAL RIGHTS.** If you disagree with the decision, you or any interested party may:

1. Appeal to the Employment Appeal Board within fifteen (15) days of the date under the judge's signature by submitting a written appeal via mail, fax, or online to:

**Employment Appeal Board  
4<sup>th</sup> Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
Online: [eab.iowa.gov](http://eab.iowa.gov)**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

**AN APPEAL TO THE BOARD SHALL STATE CLEARLY:**

- 1) The name, address, and social security number of the claimant.
- 2) A reference to the decision from which the appeal is taken.
- 3) That an appeal from such decision is being made and such appeal is signed.
- 4) The grounds upon which such appeal is based.

An Employment Appeal Board decision is final agency action. If a party disagrees with the Employment Appeal Board decision, they may then file a petition for judicial review in district court.

2. If no one files an appeal of the judge's decision with the Employment Appeal Board within fifteen (15) days, the decision becomes final agency action, and you have the option to file a petition for judicial review in District Court within thirty (30) days after the decision becomes final. Additional information on how to file a petition can be found at Iowa Code §17A.19, which is online at <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Note to Parties:** YOU MAY REPRESENT yourself in the appeal or obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds.

**Note to Claimant:** It is important that you file your weekly claim as directed, while this appeal is pending, to protect your continuing right to benefits.

**SERVICE INFORMATION:**

A true and correct copy of this decision was mailed to each of the parties listed.

**DERECHOS DE APELACIÓN.** Si no está de acuerdo con la decisión, usted o cualquier parte interesada puede:

1. Apelar a la Junta de Apelaciones de Empleo dentro de los quince (15) días de la fecha bajo la firma del juez presentando una apelación por escrito por correo, fax o en línea a:

**Employment Appeal Board  
4th Floor – Lucas Building  
Des Moines, Iowa 50319  
Fax: (515)281-7191  
En línea: [eab.iowa.gov](http://eab.iowa.gov)**

El período de apelación se extenderá hasta el siguiente día hábil si el último día para apelar cae en fin de semana o día feriado legal.

**UNA APELACIÓN A LA JUNTA DEBE ESTABLECER CLARAMENTE:**

- 1) El nombre, dirección y número de seguro social del reclamante.
- 2) Una referencia a la decisión de la que se toma la apelación.
- 3) Que se interponga recurso de apelación contra tal decisión y se firme dicho recurso.
- 4) Los fundamentos en que se funda dicho recurso.

Una decisión de la Junta de Apelaciones de Empleo es una acción final de la agencia. Si una de las partes no está de acuerdo con la decisión de la Junta de Apelación de Empleo, puede presentar una petición de revisión judicial en el tribunal de distrito.

2. Si nadie presenta una apelación de la decisión del juez ante la Junta de Apelaciones Laborales dentro de los quince (15) días, la decisión se convierte en acción final de la agencia y usted tiene la opción de presentar una petición de revisión judicial en el Tribunal de Distrito dentro de los treinta (30) días después de que la decisión adquiriera firmeza. Puede encontrar información adicional sobre cómo presentar una petición en el Código de Iowa §17A.19, que está en línea en <https://www.legis.iowa.gov/docs/code/17A.19.pdf>.

**Nota para las partes:** USTED PUEDE REPRESENTARSE en la apelación u obtener un abogado u otra parte interesada para que lo haga, siempre que no haya gastos para Workforce Development. Si desea ser representado por un abogado, puede obtener los servicios de un abogado privado o uno cuyos servicios se paguen con fondos públicos.

**Nota para el reclamante:** es importante que presente su reclamo semanal según las instrucciones, mientras esta apelación está pendiente, para proteger su derecho continuo a los beneficios.

**SERVICIO DE INFORMACIÓN:**

Se envió por correo una copia fiel y correcta de esta decisión a cada una de las partes enumeradas.